No. 93-844

In The

Supreme Court of the United States

October Term, 1993

MARVIN L. WARNER,

Petitioner,

v.

REX A. ZENT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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The Brief in Opposition seeks to obscure rather thar clarify the issues presented by this petition, necessitating this Reply.

1. What Respondent submits to the Court as the facts is essentially the same theory of the case the Special Prosecutor submitted to the jury. Brief Opp. 2-3. The jury resoundingly rejected the submission. With regard to every one of the forty-one margin payments which the Special Prosecutor alleged were unlawful, the jury found no fraudulent intent on Mr. Warner's part. With regard to six of the forty-one payments, it found Mr. Warner was reckless; on the other thirty-five, it found he did nothing wrong at all. These findings discredit Respondent's portrayal of Mr. Warner as a participant in the ESM fraud, rather than one of its victims.

2. As Respondent admits, the Court of Appeals did not adopt any of its procedural arguments, so they are not before this Court. Respondent's arguments that review by this Court would make "little sense" because (it says) the same result could have been reached below on procedural grounds (Brief Opp. 11, 15, 18), fundamentally misconceives the purpose of this Court's review. Moreover, Respondent's procedural arguments are meritless.

a. The only procedural argument accepted by either court below involved the *Bouie v. Columbia* issue, which the District Court held was barred. Pet. Appendix A 4-5. The Court of Appeals did not adopt that holding, for good reason. The Ohio courts never held this claim was procedurally barred. Mr. Warner presented it, among other places, in his briefs to the Ohio Supreme Court,

which cited and quoted *Dunn v. United States*, 442 U.S. 100 (1979) and *United States v. Bass*, 404 U.S. 336 (1971) for the due process principle that criminal statutes cannot be unforeseeably expanded. When he reiterated this constitutional claim in a motion for rehearing in the Ohio Supreme Court, citing *Bouie*, the State made no argument that the claim was new, but to the contrary referred to its arguments previously submitted. The Ohio Supreme Court considered the rehearing motion, granted it in one (unrelated) part, and denied the remainder without comment, and without any suggestion that it thought this claim was new or procedurally defaulted. Its decision is attached as Appendix A to this Reply.

The Court of Appeals would have erred if it had found a procedural bar in such circumstances. *Ylst v. Nunnemaker*, 111 S. Ct. 2590 (1991); *Harris v. Reed*, 489 U.S. 255 (1989). If the Court of Appeals had made such an error, that itself would have warranted review, because it would directly contravene the decisions of other Circuits involving the preservation of federal claims that arise from state appellate decisions.[1] It did not do so, but passed over Respondent's argument, which therefore is only a distraction in this Court.

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[1] See *Rust v. Hopkins*, 984 F.2d 1486, 1491 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993); *Cola v. Reardon*, 787 F.2d 681, 694 (1st Cir. 1986); *Williams v. Armontrout*, 891 F.2d 656, 659 n.1 (8th Cir. 1989).

b. On the *Sandstrom* issue, neither the Court of Appeals nor the District Court relied upon the alternative harmless error determination by the Ohio Supreme Court, which Respondent attempts to press here. Brief Opp. 15-16. Neither could have: the Ohio Supreme Court's analysis preceded, and cannot be reconciled with *Yates v. Eveatt*, 111 S.Ct. 1884 (1991). In finding harmless error, the Ohio Supreme Court effectively usurped the function of the jury, which acquitted Mr. Warner on all intentional counts.[2] The District Court did not purport to address the harmless error question, which would require review of the full state record, which was not before it. The fact that question may remain on remand does not detract from the importance of this substantive constitutional issue. See *Sandstrom v. Montana*, 442 U.S. 510, 527 (1979).

c. On the jury instruction issue, Respondent is correct that the opening briefs in the Court of Appeals did not focus on the *Townsend* problem – because that is not how the District Court resolved the issue. The District Court ruled in Mr. Warner's favor that the State proceedings were not full and fair under 28 U.S.C. Section

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[2] Respondent is correct that one of the counts, brought under O.R.C. § 1707.44(J), nominally required a "purpose to deceive." But the trial court defined "purpose to deceive" as "to knowingly . . . cause another to be deceived" (Tr. 11509-10), and instructed that the statutory presumption that the defendant acted "knowingly" applied to all the securities counts, including this one. *Id.* at 11502. There is thus no reason to believe that the jury did use the statutory presumption to reach its verdict on this count, like the others. See *Yates v. Eveatt*, 111 S.Ct. at 1887-8.

2254(d). See Pet. Appendix A 18-20. The District Court did not hold a hearing, however, because it held it was constitutionally immaterial whether or not the jury received these instructions in writing, since it had received the instructions orally. Pet. Appendix A 20-23. Petitioner's opening brief below addressed that substantive issue. When the Respondent's answering brief attempted to defend on the different ground of the Ohio Court's findings, Petitioner cited *Townsend* and pointed out that the state hearings were inadequate under it. Petitioner's Reply Brief at 11, *Warner v. Zent*, 6th Cir. No. 4339. When the Court of Appeals ruled as it did, Petitioner reiterated this argument in his Petition for Rehearing, which was denied without comment.

Petitioner's argument on this point has never changed – although the lower state and federal courts have used different rationales at each level, to deny him a hearing on it. There is no procedural bar to the Court's consideration of this issue, either.

3. Respondent's arguments on the merits of the *Bouie* and *Sandstrom* issues forcefully set forth its side of the case. What they do not address is the importance of the issues themselves. Both issues involve the contours of the areas of state and federal responsibility for the definition of crimes and the regulation of criminal procedure. Surely, Respondent is not correct that it is solely for the state courts to decide whether a state statute gives fair warning of a criminal prohibition, or whether a particular statutory structure unconstitutionally impinges on the right to have a jury trial on all elements of a state-created offense. The federal courts must ultimately decide these federal constitutional issues, while respecting the states'

prerogatives in defining their own laws. That is a delicate task, and its regulation is one of this Court's most central concerns and responsibilities. That is why these issues warrant *certiorari* review.

4. Respondent's most misleading arguments go to the issue on which the Court of Appeals position is most obviously untenable, the trial court's refusal to give defense counsel copies of the jury instructions. Respondent does not dispute what even the Ohio Supreme Court recognized, that this was a violation of due process. Brief Opp. 17. What Respondent defends is the Ohio Supreme Court's holding that this error was harmless, which turns on its conclusion that there was no substantial variance between the written and verbal instructions. This defense is disingenuous, at best.

Respondent says the Ohio court "fully heard" the evidence on this subject – at the same time it admits that the juror affidavits were excluded from consideration under Ohio evidentiary rules. Brief Opp. 19-20. Its argument that *Townsend v. Sain*, 372 U.S. 293 (1963) requires a federal evidentiary hearing only where the state court hearings on a constitutional issue was itself unconstitutional (*ibid.*) profoundly misunderstands *Townsend*, and the nature of federal habeas review. See *Keeney v. Tamayo Reyes*, 112 S. Ct. 1715 (1992); *Brown v. Allen*, 344 U.S. 443 (1953).

Factually, Respondent is even more misleading. It tells the Court twice that the jurors' affidavits say only that they "did not remember seeing the supplemental instructions." Brief Opp. 20, 21. However, the jurors' affidavits, which were quoted in the Petition (Petition at

28 n.26), and are set out as Appendix B to this Brief, are not so equivocal. They do not say the jurors did not "remember," but that the jurors were "certain" they "did not see" or hear of these supplemental instructions. If there were any ambiguity in them – and we see none – as the non-moving party on summary judgment, Mr. Warner was entitled to the benefit of all inferences in his favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The courts below plainly did not give him that, because they misunderstood or misapplied *Townsend*.

Unless *certiorari* is granted and this decision reversed, their decision will distort the law of the Sixth Circuit regarding this basic aspect of habeas review, and place it in conflict with the law of other Circuits. (A recent and closely analogous Ninth Circuit decision appears directly contrary. *Rhoden v. Rowland*, ___ F.3d ___, 1993 WL 485651 (9th Cir., November 29, 1993)). Respondent's defense of the Court of Appeals' decision on this issue only underscores that fact.

For all these reasons, certiorari should be granted.

Respectfully submitted,

TIMOTHY K. FORD
Attorney for Petitioner

APPENDIX A

The Supreme Court of Ohio

1990 Term

Case No. 90-84

State of Ohio,

Appellant/Cross-Appellee,

v.

Marvin L. Warner,

Appellee/Cross-Appellant.

ENTRY

November 23, 1990

This cause came on for further consideration upon appellee/cross-appellant's filing of a motion for rehearing, motion to stay the mandate pending application for a writ of certiorari to The United States Supreme Court, and motion for reduction of bail. Upon consideration thereof,

The Court finds evidence in the record to clearly support the trial court's order of restitution in the amount of $12,200,000. The record is not as clear as to the additional amount of $9,800,000 restitution set forth in the trial court's order.

IT IS ORDERED by the Court that this issue of restitution be remanded to the trial court for further proceedings, so that if the appellant/cross-appellee, State of Ohio, desires to proceed further on this issue of restitution, the parties may be permitted to present further evidence as to any losses which may have occurred as a

result of the acts set forth in counts eighty-three, eighty-five and ~~ei~~ghty-six of the indictment. This order, in this regard, does not foreclose the State of Ohio from seeking additional remedies against appellee/cross-appellant for losses suffered by Home State and its depositors.

IT IS FURTHER ORDERED by the Court that the motion for rehearing in all other respects be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that appellee/cross-appellant's motion for stay be, and the same is hereby, granted, and that, provided appellee/cross-appellant timely files a petition for writ of certiorari with The United States Supreme Court, this stay shall continue until The United States Supreme Court acts on appellee/cross-appellant's petition for writ of certiorari.

IT IS FURTHER ORDERED that appellee/cross-appellant's motion for reduction of bail be, and the same is hereby, denied.

(Court of Appeals No. C870222)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

AFFIDAVIT OF JOHN PATRICK BRADY

State of Ohio
County of Hamilton, ss:

JOHN PATRICK BRADY, being duly sworn and cautioned, deposes and states upon personal knowledge as follows:

1. I was a juror in the trial of Marvin Warner in the Hamilton County Court of Common Pleas. I was present in the jury room at all times during deliberations which began on Friday, February 20, 1987, and ended with verdicts on Monday, March 2, 1987.

2. At the beginning of our deliberations, the jury was given a black looseleaf binder containing instructions on the law. These instructions were ordinarily kept on the table in front of the jury foreman, Herman Cooper, and were read and discussed from time to time both by him and by other jurors including myself.

3. At no time during the deliberations did I see or become aware of any instructions other than those included in the looseleaf binder.

4. The court's constable, Steve Donnellon, came to the jury room several times during the deliberations. I do not recall Mr. Donnellon ever telling us that he had additional instructions for us, or leaving any additional instructions with us. I do recall him on one occasion leaving a single piece of paper on the table in the jury room, but I did not look at the paper and do not know what it was.

5. I have examined, at the request of Mr. Warner's counsel, the three documents attached to this affidavit titled Instruction 21, Instruction 9, and Instruction 17. I did not see these instructions during the deliberations, nor was their content read or otherwise made known to me.

/s/
JOHN PATRICK BRADY

Sworn to and subscribed in my presence this 2nd day of May, 1989.

/s/
Notary Public

(Seal:) ROBERT R. HASTINGS, JR.,
Attorney at Law
NOTARY PUBLIC, STATE OF OHIO
My Commission has no expiration
date, Section 147.03 R.C.

AFFIDAVIT OF RITA LAFKAS

State of Ohio
County of Hamilton, ss:

RITA LAFKAS, being duly sworn and cautioned, deposes and states upon personal knowledge as follows:

1. I was one of the jurors in the criminal case against Marvin Warner, Burton Bongard and David Schiebel in Judge Niehaus's courtroom between November 1986 and March 1987. I attended the entire deliberations of the jury beginning on February 20 and ending on March 2, 1987.

2. The jury was given a notebook containing instructions for use in its deliberations. The instructions were read aloud by the foreman, Herman Cooper, during the deliberations. I personally read some of the instructions, as did other jurors. The instructions were discussed often and at length.

3. I never saw or knew of any jury instructions other than those contained in the notebook. I have read the three pages of instructions attached to this affidavit (Instruction 21, Instruction 9, Instruction 17) and do not recall seeing them or anything similar to them during the deliberations.

4. Steve Donnellon, the constable, came to the jury room many times during the deliberations, usually on housekeeping matters such as our schedule, ordering lunch, and things of that kind. I do not recall him ever saying to us that he had additional instructions for us, or leaving additional instructions with us, and I am certain that I never saw any such additional instructions or heard them referred to by anyone else.

/s/
RITA LAFKAS

Sworn to and subscribed in my presence this 2nd day of May, 1989.

/s/
Notary Public

(Seal:) ROBERT R. HASTINGS, JR.,
Attorney at Law
NOTARY PUBLIC, STATE OF OHIO
My Commission has no expiration
date, Section 147.03 R.C.